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IN THE SUPREME COURT OF THE UNITED STATES

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AKIO KAWASHIMA, ET UX., :

Petitioners :

v. : No. 10-577

ERIC H. HOLDER, JR., ATTORNEY :

GENERAL :

- - - - - x

Washington, D.C.

Monday, November 7, 2011

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:07 a.m.

APPEARANCES:

THOMAS J. WHALEN, ESQ., Washington, D.C.; on behalf of
Petitioners.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS J. WHALEN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	CURTIS E. GANNON, ESQ.	
7	On behalf of the Respondent	16
8	REBUTTAL ARGUMENT OF	
9	THOMAS J. WHALEN, ESQ.	
10	On behalf of the Petitioners	41
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 10-577, Kawashima v. Holder.

5 Mr. Whalen.

6 ORAL ARGUMENT OF THOMAS J. WHALEN

7 ON BEHALF OF THE PETITIONERS

8 MR. WHALEN: Mr. Chief Justice, and may it
9 please the Court:

10 Mr. and Mrs. Kawashima came here to the
11 United States as legal immigrants in 1985. And later on
12 they pled guilty to filing a false statement under a
13 corporate tax return. The issue we bring to the Court
14 is whether that conviction under 26 U.S.C. 7206 is an
15 aggravated felony, specifically under (M)(i) of the
16 aggravated felony statute.

17 This Court many times has held that it is
18 the elements of the crime of conviction that determine
19 whether a crime is an aggravated felony. And the
20 elements of 7206 do not change when they go over to the
21 immigration statute. And the terms of that statute is
22 basically as the Department of Justice has written in
23 its Tax Manual. It is basically a tax perjury statute.
24 If you don't tell the truth, and you know what you are
25 saying is false, and you do it under oath, that's

1 perjury.

2 There are other statutes, perjury statutes,
3 which in essence say the same thing. And 18 U.S.C. 1001
4 is also a perjury statute. And none of them require the
5 Justice Department or a court to determine whether fraud
6 and deceit was an element of that crime.

7 JUSTICE SCALIA: How would you prove fraud
8 and deceit beyond proving that the person lied,
9 intentionally lied? What is added to intentionally
10 lying to convert that into fraud or deceit?

11 MR. WHALEN: It's the intention to deceive
12 or the intention to defraud. And simply --

13 JUSTICE SCALIA: Isn't intentionally
14 lying -- doesn't that mean that you intend to deceive?

15 MR. WHALEN: It does not, Your Honor.

16 JUSTICE SCALIA: It doesn't?

17 MR. WHALEN: It does not mean, because you
18 are saying a false -- making a false statement, that
19 that is evidence of an intent to deceive.

20 JUSTICE GINSBURG: Mr. Whalen, the common
21 definition of deceit is acting -- intentionally giving a
22 false impression, intentionally giving a false
23 impression with the intent that someone will act on it.
24 So it seems that's exactly what filing a false return
25 is. You give a false impression of what your income is

1 with the intent that the IRS will accept it.

2 MR. WHALEN: Justice Ginsburg, the
3 difference I'm trying to ask the Court to consider, it
4 is the intent which is an element of fraud and deceit.
5 Under section 7201, the tax evasion statute, that
6 includes both a requirement or a finding of fraud and
7 deceit. Section 7206 does not.

8 JUSTICE GINSBURG: But why isn't it obvious?
9 What proof would you need? You submit a document
10 because you want to convey a false impression for
11 someone to act on. Why do you have to have anything
12 more than that to establish deceit?

13 MR. WHALEN: Because the requirements, Your
14 Honor, of 7206 is a finding of -- of simply making a
15 false statement. That's all that's required. The IRS,
16 when they go after a taxpayer because they have not
17 provided -- they have not disclosed all of their income,
18 the IRS comes in, or rather the Department of Justice,
19 and all they have to prove is that it's false. They
20 don't have to prove --

21 JUSTICE KENNEDY: And that it's willful.
22 And that it's willful.

23 MR. WHALEN: Pardon me, Your Honor?

24 JUSTICE KENNEDY: That it's willful.

25 "Whoever willfully makes a false statement."

1 MR. WHALEN: Yes, Your Honor, but as this
2 Court --

3 JUSTICE KENNEDY: So that is not correct.
4 Well, correct me if I am wrong. It would seem to me
5 just from reading the statute, unless we have some gloss
6 on, that if you think it's true but it's false, from the
7 way you were indicating, would be a violation. That's
8 not the way I read it. Now, have we said something
9 other than that in later cases?

10 MR. WHALEN: If I may, Your Honor. This
11 Court has written in the Spies case, and specifically in
12 the Bishop case, that in order to be convicted of any
13 tax offense under the Internal Revenue Code, the IRS or
14 the Department of Justice must show it was done
15 willfully. Willfully is not intrinsic to any -- it's
16 really intrinsic to all of the tax offenses. Willfully
17 does not mean deceit or fraud. It simply means that the
18 IRS cannot bring a criminal information or indictment
19 against somebody who does something unintentionally.
20 They must do it willfully. Willfully, as this Court
21 defined in Bishop, is simply evidence that -- to commit
22 any of these IRS crimes you must -- it must be shown to
23 have been done willfully.

24 JUSTICE SCALIA: You know that it's false
25 when you say it. Isn't that what willfully means? You

1 must know that the statement you are making is false.

2 MR. WHALEN: Willfully means intentionally.

3 The false, I submit --

4 JUSTICE SCALIA: I don't want another
5 adverb. I want you to describe what it means in the
6 context of a statement. Doesn't it mean that you have
7 to know that the statement you are making is false.

8 Isn't that enough for willfulness?

9 MR. WHALEN: Yes.

10 JUSTICE SCALIA: Okay. Now, you tell me
11 what deceit involves beyond that.

12 MR. WHALEN: Deceit involves an intention to
13 induce somebody to act. And what I'm arguing to this
14 Court is that simply making a false statement under a
15 tax perjury statute such as we have in this case does
16 not meaning and does not evidence an intention to
17 deceive or a finding.

18 JUSTICE SOTOMAYOR: I'm sorry, but I'm a
19 little bit lost here.

20 Your definition of deceit is a false
21 statement with an intent for the other party to rely.
22 And you don't see that when you file your tax returns
23 that the government is relying on your statement to
24 calculate your tax and to ensure that you've paid it?
25 You don't see any reliance by the government on the

1 truthful statements there, and its collection of taxes?

2 MR. WHALEN: I -- I do say reliance is
3 generally is what happens. What I'm saying is that 7206
4 is a perjury statute and the government does not have to
5 prove, and did not have to prove in this case anything
6 more than the -- the -- the income was unreported or the
7 tax -- the tax return was false. If --

8 JUSTICE SOTOMAYOR: So it also had to prove
9 that the government relied? Is that what you are
10 saying?

11 MR. WHALEN: I'm saying that the
12 government -- if the government wanted to prove fraud or
13 deceit, they -- that would be an element of the crime of
14 tax evasion, 72 --

15 JUSTICE SOTOMAYOR: I'm -- I'm not even sure
16 why, because under tax evasion you can be charged with
17 tax evasion merely for avoiding the payment of tax. You
18 don't have to make a statement at all. You can take the
19 money from the bank, withdraw it openly, and stick it in
20 your mattress, refuse to pay, and if somehow they find
21 your mattress you can be charged with tax evasion.

22 Where is the falsehood and deceit in that?

23 MR. WHALEN: The government would have to
24 prove fraud or deceit, because an intent to evade is --
25 the Court -- the -- the government has to prove --

1 JUSTICE SOTOMAYOR: If there's a -- if there
2 are cases that say otherwise, what does that do to your
3 argument? Of which there are many that say that the
4 avoidance of taxes, tax payment, doesn't require an act
5 of fraud or deceit?

6 MR. WHALEN: I would be surprised by
7 those --

8 JUSTICE BREYER: Well, suppose somebody
9 goes -- he goes to a country where we have no
10 extradition treaty, takes all his assets and writes a
11 postcard to the IRS once a month saying ha-ha-ha. I
12 mean, why wouldn't that be an attempt to evade? That's
13 why he went; he didn't like to pay his taxes.

14 MR. WHALEN: Then the government would bring
15 an action under the --

16 JUSTICE BREYER: Well, 7201. Why can't
17 you -- well, why doesn't that violate 7201? I mean, my
18 simple question really is you are a drafter, imagine you
19 are a drafter, and you are charged with drafting section
20 43. And you read -- try to get the fraud and deceit
21 crimes, okay? So now we read 76 -- 7206(1) and (2).
22 And you see for both of those you can't be convicted
23 unless you materially and willfully make a false
24 statement.

25 So you think, hey, I don't need a special

1 section on that one. But then you go to 7201, and you
2 say, oh, my God, I just thought, somebody might violate
3 this by going off to some special country, taking all
4 his assets and writing ha-ha-ha. Now, there is no fraud
5 or deceit in that. He is totally open about it. But he
6 sure has evaded it. So therefore I better write a
7 special section.

8 Now, that's the simple-minded argument, but
9 what's wrong with it?

10 MR. WHALEN: What's wrong with it, Your
11 Honor, is that what we're talking about is the
12 aggravated felony statute. And the issue -- and it may
13 be a narrow one for this Court -- is whether the
14 conviction under 7206, which does not require anything
15 more than filing of a false statement without any intent
16 to deceive or defraud -- whether that is an aggravated
17 felony. And this Court has said time and again that
18 it's the elements of the offense that determines
19 aggravated felony.

20 If I may illustrate the point, if -- if a
21 conviction under 7206 was viewed by this Court as
22 including fraud and deceit for the reasons many of the
23 justices have indicated, that, you know, that when
24 somebody writes a false tax return, it's got to be
25 deceit, what that does is that would collaterally estop

1 a taxpayer from denying fraud and deceit in the civil
2 collection action.

3 So this is what Commissioner Walters was
4 concerned about, why he has filed his brief, that it in
5 effect would undermine the ability of the government to
6 get an easy conviction based simply on a false
7 statement.

8 Similarly, if you are convicted of tax
9 evasion, the -- the tax evader cannot challenge fraud.
10 He is collaterally estopped. And as we know, when the
11 government goes to seek recovery, that is getting the
12 taxes back in a civil proceeding, there is no statute of
13 limitations.

14 The intention of Congress is also reflected
15 in the Internal Revenue Code section 6501, where if a
16 person is convicted under 7206 and the government seeks
17 to collect the unpaid taxes in an assessment proceeding,
18 Congress particularly said that where there is a
19 conviction under 7206, the government has the burden of
20 proving fraud, which seems to me to be evidence -- or
21 rather, the government has the -- a duty to prove there
22 was an attempt to evade the tax. But the conclusion is
23 the same.

24 If Congress had intended that proof of fraud
25 and deceit would be in 7206, there would be no reason at

1 all for Congress to put that in 70 -- 6501.

2 Therefore --

3 CHIEF JUSTICE ROBERTS: I'm sorry. That's
4 26 U.S.C. 6501?

5 MR. WHALEN: Yes. To be more precise,
6 6501(c)(1).

7 CHIEF JUSTICE ROBERTS: Okay.

8 MR. WHALEN: That is the exceptions to the
9 running of the statute of limitations.

10 JUSTICE GINSBURG: Do we have it in the
11 briefs?

12 MR. WHALEN: I have it in my reply brief. I
13 don't have the particular statute, but I refer to it in
14 the reply brief.

15 JUSTICE SCALIA: Do you have the text of it?

16 I don't like counsel getting up here and
17 talking about statutes that they've never put before us.
18 If you're going to rely on it, we -- we would like to
19 have the text somewhere.

20 MR. WHALEN: Yes. I apologize for that,
21 Your Honor.

22 I would like to move to the second part of
23 my argument, if Your Honor please, that the -- this
24 Court has been very clear on deciding statutes invoking
25 the canons of construction. And one of the important

1 canons is that different words have different meanings.

2 So in (M)(i), we have loss to victim or
3 victims in excess of \$10,000. And in (M)(ii), we have a
4 revenue loss to the government in excess of 10,000. And
5 as this Court said in *Nijhawan*, referring to (M)(ii),
6 this is the Internal Revenue provision, a correct
7 assessment, I suggest, and that (M)(i) deals with
8 injuries or damage to third parties, not to the
9 government.

10 If you take the government's position that
11 fraud and deceit crimes are in -- fraud and deceit
12 revenue crimes are in (M)(i), then (M)(ii) would be
13 worthless or pointless.

14 JUSTICE SCALIA: Well, why? Because it
15 wouldn't be pointless if in fact an attempt to evade or
16 defeat tax does not require a lie, does not require a
17 willful lie. It would be adding to the -- to the fraud
18 and deceit offenses, 7201, which does not require a lie.
19 It just requires, you know, going to Cuba and writing
20 postcards saying, I know I owe money, I just ain't gonna
21 pay it. There is no fraud and deceit there. It's just
22 what 7201 requires, an attempt to evade or defeat tax.

23 MR. WHALEN: Anyone who leaves the country
24 with an intent to avoid tax is committing tax evasion.

25 JUSTICE SCALIA: That's right. That's my

1 very point.

2 MR. WHALEN: And that is --

3 JUSTICE SCALIA: Without lying -- without
4 lying -- without making a single lie.

5 MR. WHALEN: What I'm saying is that fraud,
6 such as you suggest, Your Honor, is going to be an
7 aggravated felony. It's the only one that Congress
8 says -- the only revenue offense. The only offense
9 under the Internal Revenue Code which Congress
10 designated as an aggravated felony.

11 What I'm saying is that if tax evasion were
12 also included in (M)(i), then Congress would have
13 created a useless, pointless provision.

14 JUSTICE SCALIA: Yes. And my point is that
15 it would not have been included within (M)(i). There is
16 no way that it could be included with (M)(i), because it
17 does not involve or deceit. It does not involve a lie,
18 as 7206 does.

19 MR. WHALEN: 7201 involves, I'm
20 suggesting --

21 JUSTICE SCALIA: An attempt to evade or
22 defeat: "Who willfully attempts in any manner to evade
23 or defeat any tax." And one can do that without lying.
24 One can do that by simply not report income, for
25 example. Or in -- in Justice Breyer's more colorful

1 example, by going to Cuba. Was it Cuba or somewhere
2 else?

3 MR. WHALEN: Well, the point I am trying to
4 make, Your Honor, is that if your example is an example
5 of fraud and deceit, which I agree it is, then a crime
6 of fraud and deceit would not be in (M)(i) because it
7 would BE -- it would already be captured in (M)(i) if
8 the government's position was upheld.

9 JUSTICE GINSBURG: But the point that is
10 being made is not that it's fraud and deceit. Quite the
11 opposite. I think Justice Breyer, Justice Sotomayor,
12 Justice Scalia have tried to get you to focus on the
13 evasion that involves no false statement at all, evading
14 payment where you say nothing. What would be the crime
15 if you simply don't pay your taxes, and you don't file
16 returns, so you are not filing anything that is false?
17 Where would that come in the internal revenue?

18 MR. WHALEN: That would be a violation of
19 one of the other internal revenue crimes.

20 JUSTICE BREYER: Would it be evasion simply
21 not to report your income?

22 MR. WHALEN: If the government chose to
23 prove that it was an attempt to evade the tax, it would.
24 The internal revenue statute and crimes all carry the
25 duty to -- it's a legal duty we all have of fairly

1 reporting our income, our deductions, what have you.

2 It's the same legal duty whether it's in 7201 or 7206.

3 The difference is in tax evasion there must
4 be proof of fraud or deceit. That's inherent. From the
5 beginning of this country -- rather, the beginning of
6 the tax statutes, Congress has always separated revenue
7 statutes from other crimes. In this case (M)(i) deals
8 with crimes involving third-parties, (M)(ii), deals with
9 revenue loss crimes to the government. Only (i) is an
10 aggravated felony.

11 I would like to reserve the remainder of my
12 time for rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Gannon.

15 ORAL ARGUMENT OF CURTIS E. GANNON

16 ON BEHALF OF THE RESPONDENT

17 MR. GANNON: Mr. Chief Justice, and may it
18 please the Court:

19 Congress's specific reference to tax evasion
20 in subparagraph (M)(ii) of the INA's definition of
21 aggravated felony did not remove all other tax offenses
22 from the scope of subparagraph (M)(i).

23 JUSTICE KAGAN: Mr. Gannon, do you think
24 that you can commit tax evasion without committing
25 either fraud or deceit, and are there cases that show

1 that?

2 MR. GANNON: The cases that we cited in our
3 brief on page 34 that discuss this are ones that are
4 evasion of payment cases as opposed to evasion of
5 assessment cases. And those -- those are instances in
6 which somebody could accurately file a tax return and
7 say I owe you this amount of money and then take steps
8 to prevent the IRS from collecting on it, usually by
9 removing their assets from the IRS's reach.

10 As a factual matter, it so happens that most
11 of those cases will often involve some concealment along
12 the way. If somebody's taking more than \$10,000 in gold
13 coins out of the country to take them to a Swiss bank,
14 they often don't mention that when they are leaving the
15 country.

16 JUSTICE SCALIA: What about just not filing
17 returns?

18 MR. GANNON: Just not filing a return is
19 probably not going to be enough to establish tax
20 evasion. That would be an offense under 7203, which
21 doesn't necessarily involve fraud or deceit. The thing
22 that distinguishes 7201 is the need for the government
23 to establish that there is an attempt to evade either
24 the assessment or payment of taxation.

25 JUSTICE KAGAN: I mean, I suppose what

1 confuses me is when somebody is convicted of 7201, they
2 can't -- they are estopped from contesting a civil fraud
3 suit, isn't that right? And it also counts as a crime
4 of moral turpitude, which involves fraud. And all of
5 those things suggest, and I think kind of the cases as a
6 whole suggest, that tax evasion involves fraud.

7 MR. GANNON: Well, certainly in the context
8 of the civil tax fraud penalty, the Tax Court has
9 concluded that intent to evade is synonymous with an
10 understatement due to fraud. And the reason why it has
11 refused to reach that conclusion in the context of 7206
12 offenses, like the ones at issue in this case, is
13 because the 7206 offense does not require the government
14 to prove that there was any understatement to begin
15 with, And so there could not have been an understatement
16 due to fraud.

17 I'd also note that it is not at all clear
18 that in the context of the evasion of payment cases that
19 I was just discussing in the context of tax evasion,
20 that the same civil tax fraud penalty would be
21 applicable there, because the civil tax fraud penalty is
22 triggered by an understatement of an amount required to
23 be shown on the return. And therefore if it is -- if it
24 isn't actually something that is done in the context of
25 filing a tax return that understates how much you owe

1 the government, then -- then that may well not trigger
2 the collateral estoppel effect in the follow-on civil
3 case.

4 JUSTICE KAGAN: Counsel, what if you do --

5 JUSTICE SOTOMAYOR: Excuse me. Are there
6 any tax provisions that you think are not covered by the
7 fraud and deceit section and the tax evasion section?

8 MR. GANNON: You mean --

9 JUSTICE SOTOMAYOR: Any tax crime.

10 MR. GANNON: Any tax crime --

11 JUSTICE SOTOMAYOR: Felonies, I should say.

12 MR. GANNON: There are several tax offenses
13 that don't necessarily involve fraud or deceit. So
14 parts of 7202, which is the willful failure to collect
15 tax, would not necessarily involve fraud and deceit, but
16 it also covers failing to truthfully account for
17 collected tax. So some of those offenses would involve
18 fraud or deceit and it may be divisible. 7203, which I
19 just mentioned --

20 JUSTICE SOTOMAYOR: Does that fall under tax
21 evasion or that's a separate statute?

22 MR. GANNON: That's not tax evasion. The
23 only thing that counts as tax evasion is 7201.

24 JUSTICE SOTOMAYOR: I cut you off. Which
25 are the other ones?

1 MR. GANNON: I was saying that I already
2 mentioned to Justice Scalia that section 7203, all of
3 these offenses I'm talking about, are in 26 U.S.C.
4 7203, the willful failure to file a return or to pay tax
5 or maintain records or supply information doesn't
6 necessarily involve fraud or deceit. Parts of 7204,
7 which is failing to furnish a statement to the employee
8 reflecting the amount of taxes, but not -- but then
9 again, I think it could be divisible because it would
10 also apply to furnishing a false statement to your
11 employee. Even the misdemeanor offense under 7207 for
12 presenting false documents might be covered for fraud or
13 deceit, but in practice it's only used when there's --
14 it's only used when the tax deficiencies are de minimis.
15 And so it would never trigger the \$10,000 loss
16 requirement that (M)(i) would also require us to
17 establish in order to make it an aggravated felony.

18 CHIEF JUSTICE ROBERTS: Counsel, what --
19 what is your answer to your friend's 6501(c)(i)
20 argument?

21 MR. GANNON: Well, my answer is that I don't
22 think it proves really any more than the collateral
23 estoppel cases in the civil fraud context the provision
24 that we're talking about is not reprinted in any of the
25 briefs, but 6501(c)(1) is an exception that -- that

1 lifts the limitation on when the IRS can levy an
2 assessment or seek collection; and it refers to the case
3 of a false or fraudulent return with the intent to evade
4 tax. And I think that in context, the reference to a
5 false or fraudulent return with intent to evade tax is
6 not something that clearly connotes that Congress is
7 just speaking to 7206 offenses. It uses not only the
8 word fraudulent, but also the intent to evade tax, which
9 I think --

10 CHIEF JUSTICE ROBERTS: Well, no, but I
11 think your friend's argument, which had some appeal, is
12 7206 is fraud and false statements. And he said if
13 you're right that that includes deceit, they wouldn't
14 have had to add "with the intent to evade tax" which is
15 what they do in 6501(c)(1).

16 MR. GANNON: Well, I -- I think if you look
17 to (c)(2) it also refers to a willful attempt in any
18 manner to defeat or evade tax. So the next provision
19 also applies more broadly to 7201 and more closely
20 tracks the definition in 7201. So I think just like the
21 statute of limitations provision that we note, Congress
22 is probably using a belt and suspenders approach there.
23 That we noted that Congress may well have had reason to
24 be concerned that 7201 offenses would not necessarily be
25 seen as having fraud or deceit as an element of the

1 offense, in light of this Court's decision in Scharton,
2 which was an old case but it had said that in the -- in
3 the statute of limitations context, that the -- the
4 extended statute of limitations that apply to offenses
5 in which fraud was an element, was not triggered by the
6 statutory predecessor to tax evasion. And so to the --

7 JUSTICE KAGAN: But Scharton was a very old
8 case which had been distinguished away by many courts.
9 This really has no power in the -- in the -- I mean,
10 tell me if I am wrong, but --

11 MR. GANNON: Well, to this day section 6531,
12 which is the statute of limitations provision which we
13 do reprint in our appendix, includes provisions that
14 refer not only generally to offenses involving fraud but
15 also specifically to a tax evasion offense. And so I
16 think that the fact that Congress had already felt like
17 it needed to be expressed, to pull in not just fraud
18 offenses but also tax evasion offenses in 6531, makes it
19 unsurprising that they would have pursued a similar
20 approach here. In addition I would --

21 JUSTICE KAGAN: I mean, the paradoxical
22 thing about your argument is that one, it makes us think
23 that Congress was just being hypervigilant about this
24 problem of making sure that tax evasion offenses were
25 covered, even though tax evasion offenses almost always

1 do involve fraud or deceit, but Congress was thinking
2 about these hypothetical possibilities that maybe there
3 was going to be some conviction out there that would not
4 involve fraud or deceit, and so Congress is being
5 super-careful about this. And yet at the same time that
6 Congress is being utterly careless, utterly clueless
7 about the basic rule of statutory construction which is
8 that one does not write superfluous language.

9 MR. GANNON: But Justice Kagan, we don't
10 think it's superfluous, in part because of the evasion
11 of payment cases we are talking about, but I think also
12 if you look at the context of the rest of paragraph 43,
13 the aggravated felony definition, you'll see that there
14 are several other provisions that have significant
15 overlap in them. And so subparagraph (A) refers to
16 murder and rape; those would also generally be covered
17 in crimes of violence in subparagraph (F). The same
18 thing is true in paragraph (E)(i); it pulls in various
19 explosive offenses including arson, destruction of
20 property or building by fire or explosives; that is the
21 reference to an 8441 --

22 JUSTICE KAGAN: So our rule of statutory
23 construction when it comes to this aggravated felony
24 statute is that superfluity doesn't matter?

25 MR. GANNON: No, Justice Kagan, I think that

1 in context, there is a lot of overlap among the
2 different provisions in -- in paragraph 43 already, and
3 I -- I was also going to mention subparagraph (K)(i) and
4 (ii), which like (M)(i) and (M)(ii) are ones that have
5 little (i), which has a generic reference there to
6 offenses associated with managing a prostitution
7 business, and little (ii) then expressly refers to
8 certain enumerated Federal statutes, all of which
9 involve transporting individuals for purposes of
10 prostitution in the case of seeking commercial
11 advantage.

12 And I think that virtually all of those
13 offenses would have been included within (K)(i) but
14 Congress wanted to be sure and therefore added (K)(ii);
15 and as -- as Justice Breyer pointed out I think before,
16 textually it -- it had reason to think that 7206 would
17 be picked up by fraud or deceit here --

18 JUSTICE GINSBURG: But 7206 is the lesser
19 offense. I mean, you don't take -- you don't dispute
20 that the heavier crime is the 7201 crime, that is,
21 evasion. It gets a more severe penalty. And when
22 Congress picks out one tax crime and one tax crime only,
23 why wouldn't we assume that that's what Congress meant
24 with respect to aggravated felonies? That there is one
25 tax crime, the most serious tax crime; that fits that

1 label. And the (M)(i) provision deals with the many,
2 many statutes that involve loss -- fraud or deceit and
3 loss to the victim?

4 MR. GANNON: The reason why we don't think
5 that's appropriate is in part because as I have
6 explained there -- there is some aspect of which (M)(ii)
7 is not superfluous. But more importantly, we don't
8 think the specific controls that General Cannon has
9 triggered here -- and we don't think that (M)(ii) talks
10 about a category of tax crimes or tax offenses more
11 generally, because it only refers to one offense. And
12 so the cases that Petitioners invoke here in order to
13 establish that there is a category that is being pulled
14 out of (M)(i) are HCSC-Laundry and Leocal. Those are
15 both cases in which the statute actually identified the
16 category of offenses in question, whether it was the
17 cooperative hospital service organizations in
18 HCSC-Laundry or DUI offenses in Leocal.

19 And so here we don't have Congress actually
20 saying tax offenses are covered by (M)(ii). What it
21 says is tax evasion is covered by (M)(ii). And --

22 JUSTICE BREYER: What about -- what about --
23 suppose that didn't even exist here, 7201. Suppose we
24 only had 7206, and the question before us was does 7206
25 fit within the term aggravated felony, i.e., does it

1 involve fraud or deceit?

2 So we read 7206; it doesn't say anything
3 about fraud or deceit. It says perjury and making a
4 false statement. So then we go look up, what are the
5 torts of fraud and deceit? And he's right. Fraud
6 traditionally requires an intent to get another person
7 to act, but you don't have to have that intent to
8 violate 7206. And deceit, it not only involves that, it
9 also involves the person having acted. So the
10 traditional tort of deceit, you have to intend the act
11 and he actually has to have acted to his detriment.
12 Fraud, you have the first of those and second. You read
13 the statute, say, well, say neither of those is present
14 here. This is just perjury, which isn't good, but it's
15 not fraud or deceit. And there we are, not in the
16 statute. What's the answer to that?

17 MR. GANNON: Well, I don't think that the
18 common law definitions of fraud and deceit are the ones
19 that this Court has always applied in the context --

20 JUSTICE BREYER: No, no, not always. But
21 here we were dealing with a very serious statute,
22 aggravated felonies, that has terrible consequences for
23 the persons who fall within it.

24 MR. GANNON: So --

25 JUSTICE BREYER: And in most of these M's

1 and A's and B's and C's, and so forth, they refer to
 2 statutes by number, so most of it although not all of it
 3 is very specific. So when we read these words fraud and
 4 deceit here, why don't we say fraud and deceit means
 5 fraud and deceit?

6 MR. GANNON: In the --

7 JUSTICE BREYER: Traditional elements.

8 MR. GANNON: In the criminal context the
 9 Court has recognized that fraud offenses don't require
 10 the government to prove reliance or damages, and that
 11 makes sense. If you think about the tort action, the
 12 classic tort action you would need to be an injured
 13 plaintiff, and therefore you would need to be able to
 14 say I relied on this to my detriment.

15 JUSTICE BREYER: No, no, no. You have to
 16 prove that the -- the liar intended reliance to -- to
 17 his detriment.

18 MR. GANNON: And --

19 JUSTICE BREYER: Which he may or may not
 20 have done. I mean, when you commit -- a person commits
 21 perjury may or may not have intended that a victim rely
 22 to his detriment. Which you don't have to prove here.

23 MR. GANNON: We do not have to prove as a
 24 separate element that there is reliance or intended
 25 reliance here, but we do need to prove what we think

1 satisfies the plain meaning of the term deceit. We are
2 not focusing on fraud here but deceit, and that's the
3 act of intentionally giving a false impression, because
4 the elements of this offense are making and signing a
5 return under the penalty of perjury that it is false in
6 a material manner, that the defendant does not --

7 JUSTICE BREYER: Deceit can mean that.

8 MR. GANNON: --does not believe to be true
9 or correct, and it's all done willfully.

10 JUSTICE BREYER: No, the tort didn't involve
11 that. The tort involved the same element of fraud which
12 you don't want to rely on.

13 MR. GANNON: That -- that's right, and we
14 think here Congress has used the -- the term --

15 JUSTICE BREYER: Is there any -- is there
16 any evidence of what -- I mean is there any argument
17 other than that you just think that and you could argue
18 the other way? I mean can we get anywhere?

19 MR. GANNON: Well, I think that Congress did
20 use the terms disjunctively here, and I think that
21 the -- now the plain meaning of deceit it sort of
22 operates in the opposite direction of the one you are
23 talking about, Justice Breyer. And if you look at the
24 way the Court in Yermian discuss the difference between
25 an intent to defraud and intent to deceive, it talks

1 about an intent to fraud includes actually obtaining
2 something whereas intent to deceive just involves
3 creating a false impression. And so I think that
4 actually the difference can run the other direction in a
5 way that supports the definition that we are relying on
6 here.

7 But going back to the point that I
8 was trying to make about this not ruling out all tax
9 offenses, Justice Ginsburg, I think that the reference
10 to 7201 alone doesn't do, that nor do we think the fact
11 that Congress then added a limited -- limiting language
12 that said that when the revenue loss exceeds \$10,000, it
13 would satisfy (M)(ii).

14 JUSTICE KAGAN: Could I make sure,
15 Mr. Gannon, that I understand your argument about
16 superfluidity? Because when I asked whether (M), the
17 second provision was superfluous, you pointed me to the
18 evasion of payment cases. And you cite two of them.
19 But then you say even those cases will almost invariably
20 involve some affirmative acts of fraud. So are there,
21 in fact, any cases, evasion of payment or otherwise,
22 which do not involve some affirmative acts of fraud?

23 MR. GANNON: Well, I think that is a factual
24 matter, Justice Kagan. We were --

25 JUSTICE KAGAN: A factual matter argument.

1 MR. GANNON: We were observing that as a
2 factual matter, those evasion-of-payment cases probably
3 would not happen without there being acts of
4 concealment.

5 JUSTICE KAGAN: And that's what I'm asking.
6 As a factual matter, can you point me to any cases that
7 do not involve affirmative acts of fraud?

8 MR. GANNON: I don't believe that I can, but
9 I think that to the extent that the Court has looked
10 into the elements of the offense in 7201, if they are
11 talking about evasion of payment, that will not
12 necessarily require deceptive acts of concealment. And
13 so that's the reason --

14 JUSTICE KAGAN: I know, but we have a very
15 active IRS which prosecutes lots of tax cases, and you
16 are saying that it just never prosecutes tax cases under
17 this section that don't involve affirmative acts of
18 fraud.

19 MR. GANNON: Well --

20 JUSTICE KAGAN: And that makes me wonder why
21 Congress was so worried about this problem that it
22 ignored normal rules of statutory interpretation.

23 MR. GANNON: Well -- And I believe that the
24 reason that they were worried could be because of the
25 Scharton decision which this Court had already said that

1 evasion does not necessarily require fraud because the
2 textual cues in 7201 are much further from fraud and
3 deceit than those in 7206, that there's also -- there
4 would be less certainty, even assuming that Congress was
5 well aware of the established practice at the Federal
6 level of having 7201 tax evasion cases be compared with
7 fraud, this is also a provision that applies to State
8 and foreign offenses. The penultimate sentence of
9 paragraph 43 says that the term applies to an offense
10 whether it's in violation of Federal State law.

11 JUSTICE GINSBURG: Well, one of the problems
12 that was brought up in the amicus brief which actually
13 was considered, that reading the (M)(i) to include 7206
14 offenses would also -- would bring in offenses that are
15 merely misdemeanors at the State and local level, it
16 would really swell the category of tax crimes that lead
17 to deportation. That -- did Congress really mean to
18 turn misdemeanors into aggravated felons?

19 And then there was a very practical point
20 made that government is going to be hurt more than
21 helped by what you are seeking, because we are told that
22 very often the government will try to make a bargain.
23 It has a 7201 case, but it's going to be a little hard
24 to prove. So they offer as a plea bargain 7206. And if
25 you -- if your position prevails, we are told, there

1 will be many, many people who will say: If it's a
2 question of whether I get thrown out of the United
3 States, I'm going to go to trial; I'm not going to plead
4 to something that will mean immediately when I serve my
5 time I will be thrown out of the United States.

6 MR. GANNON: Well, that may well be the
7 consequence of the definition that Congress has adopted
8 here of aggravated felony. And I would note in the plea
9 agreement that Mr. Kawashima filed in this case,
10 paragraph 4, which is reprinted on 117 A of the petition
11 appendix says: "Mr. Kawashima recognizes that he may be
12 deported as a result of his conviction." That's in his
13 plea agreement to the 7206 offense here. And so it is,
14 to be sure, the case that the government may well find
15 it more difficult to secure guilty pleas when an alien
16 is admitting to an offense that is an aggravated felony.
17 But we think that that's a consequence of Congress
18 having expanded the definition. In --

19 JUSTICE BREYER: Let me go up and start with
20 Justice Ginsburg's first question. I mean, if this
21 falls within it, 7206, this fraud, what about perjury?
22 Is every perjury statute within it? And what about
23 lying to a FBI agent? And what about lying to a
24 government official which is -- You know, there are all
25 kinds of statutes on that one. Are all those aggravated

1 felonies?

2 MR. GANNON: Congress has given us two
3 different metrics of determining whether those, whether
4 those offenses are aggravated felonies. If they involve
5 fraud or deceit and there is loss to the victim
6 exceeding \$10,000, then that it could fall within -- and
7 when it is perjury statute that doesn't involve loss or
8 false statements to an FBI agent that doesn't involve
9 loss to --

10 JUSTICE BREYER: The government's view is
11 that of course you have to meet the other requirements.
12 But as far as the words fraud or deceit is concerned,
13 aggravated felony picks up every perjury statute, every
14 lying statute, lying to an FBI agent, lying to this or
15 lying to that, and has that been the consistent policy
16 of the immigration service? Have they deported people
17 where the other two conditions were fulfilled?

18 MR. GANNON: In the beginning when of the
19 amount of loss was \$200,000. I think most perjury
20 offenses do not involve the loss of \$200,000 --

21 JUSTICE BREYER: But all I need are a few.
22 I mean, I just wonder, is it the policy of the INS and
23 the government to deport people where these other things
24 are met, which they may perhaps be rarely, I don't know.
25 But to deport them where the crime, the underlying crime

1 is perjury, lying to an FBI agent or lying to other
2 government officials.

3 MR. GANNON: There -- Yes, there are such
4 cases. Sometimes they go under (S), which is the
5 paragraph for perjury, which was actually not in
6 existence when (M)(i) was added to the statute. It was
7 added two years later. But more generally, I would like
8 to mention that there are other tax offenses --
9 Justice Scalia.

10 JUSTICE SCALIA: Well, I'm confused by the
11 \$10,000 requirement. Does that have to be an element of
12 the offense?

13 MR. GANNON: It does not need to be an
14 element of the offense. The consequence of the Court's
15 decision in --

16 JUSTICE SCALIA: Just the consequence of the
17 fraud or deceit, right?

18 MR. GANNON: It needs to be tied to the
19 offensive conviction, under this Court's decision in
20 Ninja. In most instances where somebody lies to an FBI
21 agent, probably don't involve costing somebody more than
22 \$10,000. And so I think that it doesn't often come up
23 in (M)(i). But many other tax offenses are prosecuted
24 under other provisions that potentially involve fraud or
25 deceit and could cost the government more than \$10,000.

1 And Petitioner's reading of saying that all tax offenses
2 have to be pulled into (M)(ii) and only tax evasion is
3 covered would require the Court to bifurcate all of
4 these other provisions. And I'm thinking of, for
5 instance, 18 U.S.C. 371. This is the provision for
6 defrauding the United States by obstructing or impeding
7 the IRS in its efforts to collect taxation. This Court
8 cited 371 as one of the fraud offenses that it thought
9 was covered by (M)(i) in the Nijhawan decision. The
10 same is true for mail fraud. The criminal division, the
11 tax division can prosecute tax cases in which somebody
12 mails a false tax return under 18 U.S.C. 1341. False
13 claims under 18 U.S.C. 287; conspiracy to false claims
14 under 286; false statements to the government, these are
15 all provisions that are used to prosecute tax offenses.
16 And Petitioner's reading of saying that all tax crimes
17 are culled out would require the Court to bifurcate
18 these offenses and make whether it's an aggravated
19 felony turn on whether the government has lost revenue
20 as opposed to some other form of money. And we don't
21 think that that's what Congress intended when it went to
22 the trouble of just stating that tax evasion was
23 expressly covered.

24 And going back, Justice Kagan, to your
25 concerns about superfluidity, I do think it's important

1 that in the context of this statute, there's lots of
2 other overlap. Congress had reasons to be unsure. In
3 light of the Scharton decision, in light of the
4 evasion-of-payment cases because even though as a
5 factual matter --

6 JUSTICE KAGAN: But It would have been
7 perfectly easy for Congress to write a provision which
8 said just in case that -- you know, just in case this
9 decision called Scharton has any effect, we mean tax
10 evasion, too, without writing it in this way that
11 appears to exclude all other tax offenses.

12 MR. GANNON: I don't see how -- if Congress
13 wanted to exclude all other tax offenses, I think they
14 should have put that exception in (M)(i). They should
15 have said: Offenses involving fraud or deceit, but not
16 tax offenses, in which the loss to the victim or victims
17 exceeds \$10,000. If Congress wanted to make an
18 exception tax offenses --

19 JUSTICE KAGAN: Well, that's just arguing
20 against our application of the normal rule of avoiding
21 superfluidity where we can.

22 MR. GANNON: Well, yes. I agree that the
23 Court avoids superfluidity where it can. Here we have
24 contextual reasons to think that Congress was just
25 trying to add more offenses to the definition rather

1 than rule out an entire class. And I also think that
2 there is no way to avoid the consequence of bifurcating
3 all of those other provisions under Petitioner's
4 reading. And so if you were to say that the reference
5 to 7201 pulls out all revenue loss offenses, that would
6 mean that some mail fraud cases against the government
7 in which the government loses more than \$10,000 count
8 and some don't. Same for wire fraud. Same for false
9 statements. Same for false claims, conspiracy to false
10 claims, and client conspiracies under section 371 which,
11 which are -- have a great deal of overlap.

12 JUSTICE SCALIA: They still wouldn't -- no.
13 Why? They still wouldn't be tax offenses.

14 MR. GANNON: Well, I -- they would be --

15 JUSTICE SCALIA: You use the mail to
16 avoid -- Still, what you are being prosecuted for is use
17 of the mail to defraud.

18 MR. GANNON: But the -- I mean, as I
19 understand Petitioner's argument, it is the fact that
20 (M)(ii) refers to revenue loss that is the thing that
21 makes it pull in or define a category of cases involving
22 tax offenses. And I think that if a mail fraud offense
23 against the government involved taking -- getting more
24 than \$10,000 worth of refunds from the government as
25 opposed to getting more than \$10,000 in an ill-gotten

1 government contract or government benefits from the
2 government, that that could still be characterized as
3 revenue loss.

4 JUSTICE SCALIA: But he put it wrong. He
5 should have said -- just tax statutes are covered.
6 Then -- then you wouldn't have to bifurcate, would you?

7 MR. GANNON: Then -- I just don't see how
8 the reference to a single provision of 7201 refers to
9 all other tax provisions --

10 JUSTICE SCALIA: Well, it's not just that.
11 It's -- it's also that -- that (M)(i) says loss to the
12 victim or victims. And (M)(ii) says the revenue loss to
13 the government has to exceed \$10,000. I mean, in one
14 case, it's the loss to the victim or victims. One --
15 why did that use parallel language? Why -- or why did
16 it say an -- an offense that involves -- an offense in
17 which the loss to the victim or victims exceeds \$10,000
18 and one involves fraud or deceit; or two, is described
19 in section 7201 of Title 26? I mean, if -- if you read
20 it, it seems to contrast loss to the victim or victims
21 with revenue loss to the government.

22 And I find it hard to regard the government
23 as a victim in any of these cases, to tell you the
24 truth.

25 MR. GANNON: None of the courts of appeals

1 has had any difficulty concluding that the government is
2 a victim when it loses more than \$10,000 in a fraud
3 case, or indeed in a tax evasion case. So here, there
4 is a different phrase, but I think what's important is
5 that 7201 doesn't define a class of revenue loss
6 offenses. Instead, it defines a class of tax evasion
7 offenses. It only refers to the one statute. And --
8 and then in that context, where there has to be a
9 deficiency in order to -- for there to be a 7201
10 conviction, there must be a tax deficiency. Then it is
11 natural to talk about the relevant losses being revenue
12 loss to the government.

13 The phrase in (M)(i) is broader because it
14 also applies to other types of frauds. And I think that
15 the reference to 7201 alone doesn't indicate Congress is
16 intending to weed out all tax offenses.

17 As Justice Ginsburg mentioned before,
18 although 7201 has a 5-year maximum statutory penalty,
19 which is longer than the 3-year maximum that applies
20 under 7206 and some of the other tax offenses in that
21 particular chapter of Title 26, as a practical matter,
22 the -- the sentencing guidelines use the same thing.
23 The -- the same criteria that are both tied to loss.

24 And more importantly, a lot of these other
25 offenses, like 371 and 1341 and 1343 in Title 18

1 actually have longer maximum punishments. So if the
2 government wants -- has a particularly big fraud that
3 they want to -- to get after somebody who has a tax
4 evasion case in which they've cost the government a
5 great deal of money -- it may choose to proceed under
6 one of the other provisions where it can get an even
7 greater punishment. And so just referring to 7201 as
8 the capstone I don't think allows it to be a stand-in
9 for all other tax offenses.

10 JUSTICE GINSBURG: There is a technical
11 aspect of this case I don't understand, and maybe you
12 can explain it. There was a question about what might
13 be the revenue loss in -- in the case of the wife. Why
14 should the revenue loss be different? She -- she is
15 convicted of aiding and abetting.

16 MR. GANNON: She -- although it -- the
17 statute itself refers to aiding, assisting, procuring or
18 advising, it's not a traditional aiding and abetting
19 statute. It doesn't require there to be an underlying
20 primary violation. It's an independent offense.

21 And so as it happens in this case, we all
22 know and it is not disputed that therefore, the same
23 underlying false tax return, the same tax return that
24 ended in 1991 for one of the corporations that
25 Petitioners co-owned, but -- but we just didn't have

1 that evidence in the record.

2 And so, I -- I think even though it's an
3 aiding and abetting, it's not a classic aiding and
4 abetting violation that depends on the -- the husband's
5 conviction. She could have been convicted under 7206,
6 too, even if the husband didn't know anything about the
7 false numbers that she was providing him from the
8 restaurant that they were operating.

9 So if there are no further questions, we
10 would urge the Court to affirm the court of appeals.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Whalen, you have eight minutes
13 remaining.

14 REBUTTAL ARGUMENT OF THOMAS J. WHALEN

15 ON BEHALF OF THE PETITIONERS

16 MR. WHALEN: My colleague mentioned the
17 Yermian case, which is in our brief, but I failed to
18 present it to the Court today. And it's a very
19 important case decided by this Court which said that
20 filing a false statement is not -- is not indicative,
21 not evidence of an intent to deceive.

22 Similarly, the Harry Bridges case, also
23 decided by this Court, said that -- and the Court held
24 that making a false statement about Mr. Bridges'
25 involvement with the Communist Party is not evidence of

1 fraud.

2 These cases, I believe of this Court,
3 control the issue that deceit or fraud is not an
4 essential element for this crime of conviction.
5 Following up what Justice Kagan has said, has asked,
6 that the rules -- canons of construction that the
7 Petitioner has invoked, the rules of superfluities --
8 again superfluities -- the idea that a court must give
9 cognizance to different words meaning different
10 things -- that is, revenue loss from the government is
11 different from revenue loss to victim or victims, and
12 the specific versus the general.

13 The answer of the government is simply
14 speculation and conjecture of, among other things,
15 courts make the wrong decisions, Congress didn't
16 understand that tax evasion does involve fraud, and
17 therefore, it will be superfluous.

18 The position of the government in this case
19 is simply that tax evasion may not be in 72 -- or may
20 not be in (M)(ii), the reason, rather, that fraud and
21 deceit may not be in tax evasion, but that a lesser
22 revenue offense is in (M)(i).

23 We -- I would like to remind the Court as
24 many of the justices have indicated, we're not looking
25 at an idea of someone who suffers a penalty because --

1 as a result of the tax offense. We are talking about
2 banishment. And we are talking about deportation. And
3 the statute which were involved should be read in favor,
4 where Congress has not been clear, the statute should be
5 read in favor of the immigrant.

6 JUSTICE GINSBURG: Although it's not a
7 criminal statute?

8 MR. WHALEN: Pardon me, Your Honor?

9 JUSTICE GINSBURG: It's not a criminal
10 statute.

11 MR. WHALEN: This Court in the Fong case
12 said that the rule of lenity applies to an immigration
13 case. And the holdings of this Court have been
14 consistent that the rule of lenity applies to both
15 criminal cases as well as immigration cases. And I
16 invite the Court to look at the cases we have cited that
17 the rule of lenity has applied, in fact, to immigration
18 cases.

19 JUSTICE GINSBURG: There -- there's one
20 technical feature, too, that I also didn't understand.
21 The particular tax here in question, the failure to
22 report was 76-some thousand dollars, but the number that
23 was given for the total failure to report is over
24 \$1 million, and the -- the loss to the IRS at -- is
25 \$245,000. So the \$245,000 loss must refer to more than

1 the failure to report \$76,000.

2 MR. WHALEN: The threshold amount is not an
3 issue in the case.

4 JUSTICE GINSBURG: I would just like to know
5 how we got -- how the \$245,000 revenue loss was
6 calculated, given that the crime that was charged, the
7 failure was to report only \$76,000?

8 MR. WHALEN: I don't know. It was in
9 negotiations between the government and the Kawashimas.
10 In any compromise the government chose only to charge
11 them with a crime under 7206 which -- and to settle on
12 that basis. As Justice Alito has mentioned in the
13 Padilla case quite emphatically, that attorneys
14 representing immigrants deal with the government in
15 order to avoid deportation. And that -- in this case
16 whether the Kawashimas had in fact filed false returns
17 in an attempt to deceive, that was by the boards,
18 because the government and the taxpayer agreed that
19 their offense would be solely 7206, which as you read
20 the elements, and you can read the Justice Department
21 handbook which tells you what the elements are, and it
22 does not include fraud and deceit.

23 If there are no further questions I --
24 finally I would like to mention one case which hasn't
25 been brought up, which evolved from the questions by the

1 justices, and that is a Third Circuit case which we
2 cited, Nugent -- mentioned in response to Justice
3 Breyer's question, that the Nugent case said that you
4 must fulfill both elements, that is the perjury, S under
5 the statute, and if it's included in fraud and deceit,
6 you must fulfill the elements of both crimes at issue.

7 And of course in this case, the Kawashimas
8 did not -- were imprisoned for 4 months and did not meet
9 the statutory requirement for an aggravated felony of 1
10 year.

11 But in any event I want -- I would like the
12 Court to keep in mind that what we are dealing here with
13 is perjury, and we are not dealing with fraud or deceit,
14 as agreed to by the government and the taxpayer. And
15 that, I suggest to the Court, should be dispositive in
16 the decision in this case.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

19 (Whereupon, at 12:08 p.m., the case in the
20 above-entitled matter was submitted.)

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25

A				C
abetting 40:15 40:18 41:3,4 ability 11:5 able 27:13 above-entitled 1:12 45:20 accept 5:1 account 19:16 accurately 17:6 act 4:23 5:11 7:13 9:4 26:7 26:10 28:3 acted 26:9,11 acting 4:21 action 9:15 11:2 27:11,12 active 30:15 acts 29:20,22 30:3,7,12,17 add 21:14 36:25 added 4:9 24:14 29:11 34:6,7 adding 13:17 addition 22:20 admitting 32:16 adopted 32:7 advantage 24:11 adverb 7:5 advising 40:18 affirm 41:10 affirmative 29:20,22 30:7 30:17 agent 32:23 33:8 33:14 34:1,21 aggravated 3:15 3:16,19 10:12 10:16,19 14:7 14:10 16:10,21 20:17 23:13,23 24:24 25:25 26:22 31:18 32:8,16,25 33:4 33:13 35:18	45:9 agree 15:5 36:22 agreed 44:18 45:14 agreement 32:9 32:13 aiding 40:15,17 40:18 41:3,3 ain't 13:20 AKIO 1:3 alien 32:15 Alito 44:12 allows 40:8 amicus 31:12 amount 17:7 18:22 20:8 33:19 44:2 answer 20:19,21 26:16 42:13 apologize 12:20 appeal 21:11 appeals 38:25 41:10 APPEARANC... 1:15 appears 36:11 appendix 22:13 32:11 applicable 18:21 application 36:20 applied 26:19 43:17 applies 21:19 31:7,9 39:14,19 43:12,14 apply 20:10 22:4 approach 21:22 22:20 appropriate 25:5 argue 28:17 arguing 7:13 36:19 argument 1:13 2:2,5,8 3:4,6 9:3 10:8 12:23	16:15 20:20 21:11 22:22 28:16 29:15,25 37:19 41:14 arson 23:19 asked 29:16 42:5 asking 30:5 aspect 25:6 40:11 assessment 11:17 13:7 17:5 17:24 21:2 assets 9:10 10:4 17:9 Assistant 1:18 assisting 40:17 associated 24:6 assume 24:23 assuming 31:4 attempt 9:12 11:22 13:15,22 14:21 15:23 17:23 21:17 44:17 attempts 14:22 ATTORNEY 1:6 attorneys 44:13 avoid 13:24 37:2 37:16 44:15 avoidance 9:4 avoiding 8:17 36:20 avoids 36:23 aware 31:5 A's 27:1 a.m 1:14 3:2	basically 3:22,23 basis 44:12 beginning 16:5,5 33:18 behalf 1:16,20 2:4,7,10 3:7 16:16 41:15 believe 28:8 30:8 30:23 42:2 belt 21:22 benefits 38:1 better 10:6 beyond 4:8 7:11 bifurcate 35:3,17 38:6 bifurcating 37:2 big 40:2 Bishop 6:12,21 bit 7:19 boards 44:17 Breyer 9:8,16 15:11,20 24:15 25:22 26:20,25 27:7,15,19 28:7 28:10,15,23 32:19 33:10,21 Breyer's 14:25 45:3 Bridges 41:22,24 brief 11:4 12:12 12:14 17:3 31:12 41:17 briefs 12:11 20:25 bring 3:13 6:18 9:14 31:14 broader 39:13 broadly 21:19 brought 31:12 44:25 building 23:20 burden 11:19 business 24:7 B's 27:1	c 2:1 3:1 21:17 calculate 7:24 calculated 44:6 called 36:9 Cannon 25:8 canons 12:25 13:1 42:6 capstone 40:8 captured 15:7 careless 23:6 carry 15:24 case 3:4 6:11,12 7:15 8:5 16:7 18:12 19:3 21:2 22:2,8 24:10 31:23 32:9,14 36:8,8 38:14 39:3,3 40:4,11 40:13,21 41:17 41:19,22 42:18 43:11,13 44:3 44:13,15,24 45:1,3,7,16,18 45:19 cases 6:9 9:2 16:25 17:2,4,5 17:11 18:5,18 20:23 23:11 25:12,15 29:18 29:19,21 30:2,6 30:15,16 31:6 34:4 35:11 36:4 37:6,21 38:23 42:2 43:15,15 43:16,18 category 25:10 25:13,16 31:16 37:21 certain 24:8 certainly 18:7 certainty 31:4 challenge 11:9 change 3:20 chapter 39:21

characterized 38:2	colorful 14:25	42:15 43:4	corporate 3:13	8:13 15:5,14
charge 44:10	come 15:17	Congress's	corporations	18:3 19:9,10
charged 8:16,21	34:22	16:19	40:24	24:20,20,22,22
9:19 44:6	comes 5:18	conjecture 42:14	correct 6:3,4	24:25,25 33:25
Chief 3:3,8 12:3	23:23	connotes 21:6	13:6 28:9	33:25 42:4 44:6
12:7 16:13,17	commercial	consequence	cost 34:25 40:4	44:11
20:18 21:10	24:10	32:7,17 34:14	costing 34:21	crimes 6:22 9:21
41:11 45:17	Commissioner	34:16 37:2	counsel 12:16	13:11,12 15:19
choose 40:5	11:3	consequences	16:13 19:4	15:24 16:7,8,9
chose 15:22	commit 6:21	26:22	20:18 41:11	23:17 25:10
44:10	16:24 27:20	consider 5:3	45:17	31:16 35:16
Circuit 45:1	commits 27:20	considered 31:13	count 37:7	45:6
cite 29:18	committing	consistent 33:15	country 9:9 10:3	criminal 6:18
cited 17:2 35:8	13:24 16:24	43:14	13:23 16:5	27:8 35:10 43:7
43:16 45:2	common 4:20	conspiracies	17:13,15	43:9,15
civil 11:1,12 18:2	26:18	37:10	counts 18:3	criteria 39:23
18:8,20,21 19:2	Communist	conspiracy 35:13	19:23	Cuba 13:19 15:1
20:23	41:25	37:9	course 33:11	15:1
claims 35:13,13	compared 31:6	construction	45:7	cues 31:2
37:9,10	compromise	12:25 23:7,23	court 1:1,13 3:9	culled 35:17
class 37:1 39:5,6	44:10	42:6	3:13,17 4:5 5:3	CURTIS 1:18
classic 27:12	concealment	contesting 18:2	6:2,11,20 7:14	2:6 16:15
41:3	17:11 30:4,12	context 7:6 18:7	8:25-10:13,17	cut 19:24
clear 12:24 18:17	concerned 11:4	18:11,18,19,24	10:21 12:24	C's 27:1
43:4	21:24 33:12	20:23 21:4 22:3	13:5 16:18 18:8	
clearly 21:6	concerns 35:25	23:12 24:1	26:19 27:9	D
client 37:10	concluded 18:9	26:19 27:8 36:1	28:24 30:9,25	D 3:1
closely 21:19	concluding 39:1	39:8	35:3,7,17 36:23	damage 13:8
clueless 23:6	conclusion 11:22	contextual 36:24	41:10,10,18,19	damages 27:10
Code 6:13 11:15	18:11	contract 38:1	41:23,23 42:2,8	day 22:11
14:9	conditions 33:17	contrast 38:20	42:23 43:11,13	de 20:14
cognizance 42:9	confused 34:10	control 42:3	43:16 45:12,15	deal 37:11 40:5
coins 17:13	confuses 18:1	controls 25:8	courts 22:8 38:25	44:14
collateral 19:2	Congress 11:14	convert 4:10	42:15	dealing 26:21
20:22	11:18,24 12:1	convey 5:10	Court's 22:1	45:12,13
collaterally	14:7,9,12 16:6	convicted 6:12	34:14,19	deals 13:7 16:7,8
10:25 11:10	21:6,21,23	9:22 11:8,16	covered 19:6	25:1
colleague 41:16	22:16,23 23:1,4	18:1 40:15 41:5	20:12 22:25	deceit 4:6,8,10
collect 11:17	23:6 24:14,22	conviction 3:14	23:16 25:20,21	4:21 5:4,7,12
19:14 35:7	24:23 25:19	3:18 10:14,21	35:3,9,23 38:5	6:17 7:11,12,20
collected 19:17	28:14,19 29:11	11:6,19 23:3	covers 19:16	8:13,22,24 9:5
collecting 17:8	30:21 31:4,17	32:12 34:19	co-owned 40:25	9:20 10:5,22,25
collection 8:1	32:7,17 33:2	39:10 41:5 42:4	created 14:13	11:1,25 13:11
11:2 21:2	35:21 36:2,7,12	cooperative	creating 29:3	13:11,18,21
	36:17,24 39:15	25:17	crime 3:18,19 4:6	14:17 15:5,6,10

16:4,25 17:21 19:7,13,15,18 20:6,13 21:13 21:25 23:1,4 24:17 25:2 26:1 26:3,5,8,10,15 26:18 27:4,4,5 28:1,2,7,21 31:3 33:5,12 34:17,25 36:15 38:18 42:3,21 44:22 45:5,13 deceive 4:11,14 4:19 7:17 10:16 28:25 29:2 41:21 44:17 deceptive 30:12 decided 41:19,23 deciding 12:24 decision 22:1 30:25 34:15,19 35:9 36:3,9 45:16 decisions 42:15 deductions 16:1 defeat 13:16,22 14:22,23 21:18 defendant 28:6 deficiencies 20:14 deficiency 39:9 39:10 define 37:21 39:5 defined 6:21 defines 39:6 definition 4:21 7:20 16:20 21:20 23:13 29:5 32:7,18 36:25 definitions 26:18 defraud 4:12 10:16 28:25 37:17 defrauding 35:6	denying 11:1 Department 1:19 3:22 4:5 5:18 6:14 44:20 depends 41:4 deport 33:23,25 deportation 31:17 43:2 44:15 deported 32:12 33:16 describe 7:5 described 38:18 designated 14:10 destruction 23:19 determine 3:18 4:5 determines 10:18 determining 33:3 detriment 26:11 27:14,17,22 difference 5:3 16:3 28:24 29:4 different 13:1,1 24:2 33:3 39:4 40:14 42:9,9,11 difficult 32:15 difficulty 39:1 direction 28:22 29:4 disclosed 5:17 discuss 17:3 28:24 discussing 18:19 disjunctively 28:20 dispositive 45:15 dispute 24:19 disputed 40:22 distinguished 22:8 distinguishes 17:22	divisible 19:18 20:9 division 35:10,11 document 5:9 documents 20:12 dollars 43:22 drafter 9:18,19 drafting 9:19 due 18:10,16 DUI 25:18 duty 11:21 15:25 15:25 16:2 D.C 1:9,16,19 <hr/> E E 1:18 2:1,6 3:1,1 16:15 23:18 easy 11:6 36:7 effect 11:5 19:2 36:9 efforts 35:7 eight 41:12 either 16:25 17:23 element 4:6 5:4 8:13 21:25 22:5 27:24 28:11 34:11,14 42:4 elements 3:18,20 10:18 27:7 28:4 30:10 44:20,21 45:4,6 emphatically 44:13 employee 20:7 20:11 ended 40:24 ensure 7:24 entire 37:1 enumerated 24:8 ERIC 1:6 ESQ 1:16,18 2:3 2:6,9 essence 4:3 essential 42:4	establish 5:12 17:19,23 20:17 25:13 established 31:5 estop 10:25 estopped 11:10 18:2 estoppel 19:2 20:23 ET 1:3 evade 8:24 9:12 11:22 13:15,22 14:21,22 15:23 17:23 18:9 21:3 21:5,8,14,18 evaded 10:6 evader 11:9 evading 15:13 evasion 5:5 8:14 8:16,17,21 11:9 13:24 14:11 15:13,20 16:3 16:19,24 17:4,4 17:20 18:6,18 18:19 19:7,21 19:22,23 22:6 22:15,18,24,25 23:10 24:21 25:21 29:18,21 30:11 31:1,6 35:2,22 36:10 39:3,6 40:4 42:16,19,21 evasion-of-pay... 30:2 36:4 event 45:11 evidence 4:19 6:21 7:16 11:20 28:16 41:1,21 41:25 evolved 44:25 exactly 4:24 example 14:25 15:1,4,4 exceed 38:13	exceeding 33:6 exceeds 29:12 36:17 38:17 exception 20:25 36:14,18 exceptions 12:8 excess 13:3,4 exclude 36:11,13 Excuse 19:5 exist 25:23 existence 34:6 expanded 32:18 explain 40:12 explained 25:6 explosive 23:19 explosives 23:20 expressed 22:17 expressly 24:7 35:23 extended 22:4 extent 30:9 extradition 9:10 <hr/> F F 23:17 fact 13:15 22:16 29:10,21 37:19 43:17 44:16 factual 17:10 29:23,25 30:2,6 36:5 failed 41:17 failing 19:16 20:7 failure 19:14 20:4 43:21,23 44:1,7 fairly 15:25 fall 19:20 26:23 33:6 falls 32:21 false 3:12,25 4:18,18,22,22 4:24,25 5:10,15 5:19,25 6:6,24 7:1,3,7,14,20
--	--	---	---	---

8:7 9:23 10:15 10:24 11:6 15:13,16 20:10 20:12 21:3,5,12 26:4 28:3,5 29:3 33:8 35:12 35:12,13,14 37:8,9,9 40:23 41:7,20,24 44:16 falsehood 8:22 far 33:12 favor 43:3,5 FBI 32:23 33:8 33:14 34:1,20 feature 43:20 Federal 24:8 31:5,10 felonies 19:11 24:24 26:22 33:1,4 felons 31:18 felony 3:15,16 3:19 10:12,17 10:19 14:7,10 16:10,21 20:17 23:13,23 25:25 32:8,16 33:13 35:19 45:9 felt 22:16 file 7:22 15:15 17:6 20:4 filed 11:4 32:9 44:16 filing 3:12 4:24 10:15 15:16 17:16,18 18:25 41:20 finally 44:24 find 8:20 32:14 38:22 finding 5:6,14 7:17 fire 23:20 first 26:12 32:20	fit 25:25 fits 24:25 focus 15:12 focusing 28:2 Following 42:5 follow-on 19:2 Fong 43:11 foreign 31:8 form 35:20 forth 27:1 fraud 4:5,7,10 5:4,6 6:17 8:12 8:24 9:5,20 10:4,22 11:1,9 11:20,24 13:11 13:11,17,21 14:5 15:5,6,10 16:4,25 17:21 18:2,4,6,8,10 18:16,20,21 19:7,13,15,18 20:6,12,23 21:12,25 22:5 22:14,17 23:1,4 24:17 25:2 26:1 26:3,5,5,12,15 26:18 27:3,4,5 27:9 28:2,11 29:1,20,22 30:7 30:18 31:1,2,7 32:21 33:5,12 34:17,24 35:8 35:10 36:15 37:6,8,22 38:18 39:2 40:2 42:1 42:3,16,20 44:22 45:5,13 frauds 39:14 fraudulent 21:3,5 21:8 friend's 20:19 21:11 fulfill 45:4,6 fulfilled 33:17 furnish 20:7	furnishing 20:10 further 31:2 41:9 44:23 <hr/> G <hr/> G 3:1 Gannon 1:18 2:6 16:14,15,17,23 17:2,18 18:7 19:8,10,12,22 20:1,21 21:16 22:11 23:9,25 25:4 26:17,24 27:6,8,18,23 28:8,13,19 29:15,23 30:1,8 30:19,23 32:6 33:2,18 34:3,13 34:18 36:12,22 37:14,18 38:7 38:25 40:16 general 1:7,19 25:8 42:12 generally 8:3 22:14 23:16 25:11 34:7 generic 24:5 getting 11:11 12:16 37:23,25 Ginsburg 4:20 5:2,8 12:10 15:9 24:18 29:9 31:11 39:17 40:10 43:6,9,19 44:4 Ginsburg's 32:20 give 4:25 42:8 given 33:2 43:23 44:6 giving 4:21,22 28:3 gloss 6:5 go 3:20 5:16 10:1 26:4 32:3,19 34:4	God 10:2 goes 9:9,9 11:11 going 10:3 12:18 13:19 14:6 15:1 17:19 23:3 24:3 29:7 31:20,23 32:3,3 35:24 gold 17:12 gonna 13:20 good 26:14 government 7:23 7:25 8:4,9,12 8:12,23,25 9:14 11:5,11,16,19 11:21 13:4,9 15:22 16:9 17:22 18:13 19:1 27:10 31:20,22 32:14 32:24 33:23 34:2,25 35:14 35:19 37:6,7,23 37:24 38:1,1,2 38:13,21,22 39:1,12 40:2,4 42:10,13,18 44:9,10,14,18 45:14 government's 13:10 15:8 33:10 great 37:11 40:5 greater 40:7 guidelines 39:22 guilty 3:12 32:15 <hr/> H <hr/> H 1:6 handbook 44:21 happen 30:3 happens 8:3 17:10 40:21 hard 31:23 38:22 Harry 41:22 ha-ha-ha 9:11	10:4 HCSC-Laundry 25:14,18 hear 3:3 heavier 24:20 held 3:17 41:23 helped 31:21 hey 9:25 Holder 1:6 3:4 holdings 43:13 Honor 4:15 5:14 5:23 6:1,10 10:11 12:21,23 14:6 15:4 43:8 hospital 25:17 hurt 31:20 husband 41:6 husband's 41:4 hypervigilant 22:23 hypothetical 23:2 <hr/> I <hr/> idea 42:8,25 identified 25:15 ignored 30:22 ii 13:3,5,12 16:8 16:20 24:4,4,7 24:14 25:6,9,20 25:21 29:13 35:2 37:20 38:12 42:20 illustrate 10:20 ill-gotten 37:25 imagine 9:18 immediately 32:4 immigrant 43:5 immigrants 3:11 44:14 immigration 3:21 33:16 43:12,15 43:17 impeding 35:6
---	---	---	--	--

important 12:25 35:25 39:4 41:19	35:21	IRS 5:1,15,18 6:13,18,22 9:11 17:8 21:1 30:15 35:7 43:24	justices 10:23 42:24 45:1	levy 21:1
importantly 25:7 39:24	intending 39:16	intention 4:19,23 5:1,4 7:21 8:24 10:15 13:24	<hr/> K <hr/>	liar 27:16
impression 4:22 4:23,25 5:10 28:3 29:3	intent 4:19,23 5:1,4 7:21 8:24 10:15 13:24	IRS's 17:9	K 24:3,13,14	lie 13:16,17,18 14:4,17
imprisoned 45:8	intention 4:11,12 7:12,16 11:14	issue 3:13 10:12 18:12 42:3 44:3 45:6	Kagan 16:23 17:25 19:4 22:7 22:21 23:9,22 23:25 29:14,24 29:25 30:5,14 30:20 35:24 36:6,19 42:5	lied 4:8,9
INA's 16:20	intentionally 4:9 4:9,13,21,22 7:2 28:3	i.e 25:25	<hr/> J <hr/>	lies 34:20
include 31:13 44:22	internal 6:13 11:15 13:6 14:9 15:17,19,24	J 1:16 2:3,9 3:6 41:14	Kawashima 1:3 3:4,10 32:9,11	lifts 21:1
included 14:12 14:15,16 24:13 45:5	interpretation 30:22	JR 1:6	Kawashimas 44:9,16 45:7	light 22:1 36:3,3
includes 5:6 21:13 22:13 29:1	intrinsic 6:15,16	Justice 1:19 3:3 3:8,22 4:5,7,13 4:16,20 5:2,8 5:18,21,24 6:3 6:14,24 7:4,10 7:18 8:8,15 9:1 9:8,16 12:3,7 12:10,15 13:14 13:25 14:3,14 14:21,25 15:9 15:11,11,12,20 16:13,17,23 17:16,25 19:4,5 19:9,11,20,24 20:2,18 21:10 22:7,21 23:9,22 23:25 24:15,18 25:22 26:20,25 27:7,15,19 28:7 28:10,15,23 29:9,14,24,25 30:5,14,20 31:11 32:19,20 33:10,21 34:9 34:10,16 35:24 36:6,19 37:12 37:15 38:4,10 39:17 40:10 41:11 42:5 43:6 43:9,19 44:4,12 44:20 45:2,17	keep 45:12	limitation 21:1
including 10:22 23:19	invariably 29:19		KENNEDY 5:21 5:24 6:3	limitations 11:13 12:9 21:21 22:3 22:4,12
income 4:25 5:17 8:6 14:24 15:21 16:1	invoked 42:7		kind 18:5	limited 29:11
independent 40:20	invoking 12:24		kinds 32:25	limiting 29:11
indicate 39:15	involve 14:17,17 17:11,21 19:13 19:15,17 20:6 23:1,4 24:9 25:2 26:1 28:10 29:20,22 30:7 30:17 33:4,7,8 33:20 34:21,24 42:16		know 3:24 6:24 7:1,7 10:23 11:10 13:19,20 30:14 32:24 33:24 36:8 40:22 41:6 44:4 44:8	little 7:19 24:5,7 31:23
indicated 10:23 42:24	involved 28:11 37:23 43:3		<hr/> L <hr/>	local 31:15
indicating 6:7	involvement 41:25		label 25:1	longer 39:19 40:1
indicative 41:20	involves 7:11,12 14:19 15:13 18:4,6 26:8,9 29:2 38:16,18		language 23:8 29:11 38:15	look 21:16 23:12 26:4 28:23 43:16
indictment 6:18	involving 16:8 22:14 36:15 37:21		law 26:18 31:10	looked 30:9
individuals 24:9			lead 31:16	looking 42:24
induce 7:13			leaves 13:23	loses 37:7 39:2
information 6:18 20:5			leaving 17:14	loss 13:2,4 16:9 20:15 25:2,3 29:12 33:5,7,9 33:19,20 36:16 37:5,20 38:3,11 38:12,14,17,20 38:21 39:5,12 39:23 40:13,14 42:10,11 43:24 43:25 44:5
inherent 16:4			legal 3:11 15:25 16:2	losses 39:11
injured 27:12			lenity 43:12,14 43:17	lost 7:19 35:19
injuries 13:8			Leocal 25:14,18	lot 24:1 39:24
INS 33:22			lesser 24:18 42:21	lots 30:15 36:1
instance 35:5			level 31:6,15	lying 4:10,14 14:3,4,23 32:23 32:23 33:14,14 33:14,15 34:1,1
instances 17:5 34:20				<hr/> M <hr/>
intend 4:14 26:10				
intended 11:24 27:16,21,24				

M 3:15 13:2,3,5 13:7,12,12 14:12,15,16 15:6,7 16:7,8 16:20,22 20:16 24:4,4 25:1,6,9 25:14,20,21 29:13,16 31:13 34:6,23 35:2,9 36:14 37:20 38:11,12 39:13 42:20,22 mail 35:10 37:6 37:15,17,22 mails 35:12 maintain 20:5 making 4:18 5:14 7:1,7,14 14:4 22:24 26:3 28:4 41:24 managing 24:6 manner 14:22 21:18 28:6 Manual 3:23 material 28:6 materially 9:23 matter 1:12 17:10 23:24 29:24,25 30:2,6 36:5 39:21 45:20 mattress 8:20,21 maximum 39:18 39:19 40:1 mean 4:14,17 6:17 7:6 9:12 9:17 17:25 19:8 22:9,21 24:19 27:20 28:7,16 28:18 31:17 32:4,20 33:22 36:9 37:6,18 38:13,19 meaning 7:16 28:1,21 42:9	meanings 13:1 means 6:17,25 7:2,5 27:4 meant 24:23 meet 33:11 45:8 mention 17:14 24:3 34:8 44:24 mentioned 19:19 20:2 39:17 41:16 44:12 45:2 merely 8:17 31:15 met 33:24 metrics 33:3 million 43:24 mind 45:12 minimis 20:14 minutes 41:12 misdemeanor 20:11 misdemeanors 31:15,18 Monday 1:10 money 8:19 13:20 17:7 35:20 40:5 month 9:11 months 45:8 moral 18:4 move 12:22 murder 23:16 M's 26:25	34:13 needed 22:17 needs 34:18 negotiations 44:9 neither 26:13 never 12:17 20:15 30:16 Nijhawan 13:5 35:9 Ninja 34:20 normal 30:22 36:20 note 18:17 21:21 32:8 noted 21:23 November 1:10 Nugent 45:2,3 number 27:2 43:22 numbers 41:7	22:24,25 23:19 24:6,13 25:10 25:16,18,20 27:9 29:9 31:8 31:14,14 33:4 33:20 34:8,23 35:1,8,15,18 36:11,13,15,16 36:18,25 37:5 37:13,22 39:6,7 39:16,20,25 40:9 offensive 34:19 offer 31:24 official 32:24 officials 34:2 oh 10:2 okay 7:10 9:21 12:7 old 22:2,7 once 9:11 ones 17:3 18:12 19:25 24:4 26:18 open 10:5 openly 8:19 operates 28:22 operating 41:8 opposed 17:4 35:20 37:25 opposite 15:11 28:22 oral 1:12 2:2,5 3:6 16:15 order 6:12 20:17 25:12 39:9 44:15 organizations 25:17 overlap 23:15 24:1 36:2 37:11 owe 13:20 17:7 18:25	P 3:1 Padilla 44:13 page 2:2 17:3 paid 7:24 paradoxical 22:21 paragraph 23:12 23:18 24:2 31:9 32:10 34:5 parallel 38:15 Pardon 5:23 43:8 part 12:22 23:10 25:5 particular 12:13 39:21 43:21 particularly 11:18 40:2 parties 13:8 parts 19:14 20:6 party 7:21 41:25 pay 8:20 9:13 13:21 15:15 20:4 payment 8:17 9:4 15:14 17:4,24 18:18 23:11 29:18,21 30:11 penalty 18:8,20 18:21 24:21 28:5 39:18 42:25 penultimate 31:8 people 32:1 33:16,23 perfectly 36:7 perjury 3:23 4:1 4:2,4 7:15 8:4 26:3,14 27:21 28:5 32:21,22 33:7,13,19 34:1 34:5 45:4,13 person 4:8 11:16 26:6,9 27:20 persons 26:23 petition 32:10
	<hr/> N <hr/> N 2:1,1 3:1 narrow 10:13 natural 39:11 necessarily 17:21 19:13,15 20:6 21:24 30:12 31:1 need 5:9 9:25 17:22 27:12,13 27:25 33:21	<hr/> O <hr/> O 2:1 3:1 oath 3:25 observing 30:1 obstructing 35:6 obtaining 29:1 obvious 5:8 offense 6:13 10:18 14:8,8 17:20 18:13 20:11 22:1,15 24:19 25:11 28:4 30:10 31:9 32:13,16 34:12 34:14 37:22 38:16,16 40:20 42:22 43:1 44:19 offenses 6:16 13:18 16:21 18:12 19:12,17 20:3 21:7,24 22:4,14,18,18	<hr/> P <hr/>	

Petitioner 42:7	presenting 20:12	40:6	recognized 27:9	require 4:4 9:4
Petitioners 1:4	prevails 31:25	pull 22:17 37:21	recognizes 32:11	10:14 13:16,16
1:17 2:4,10 3:7	prevent 17:8	pulled 25:13 35:2	record 41:1	13:18 18:13
25:12 40:25	primary 40:20	pulls 23:18 37:5	records 20:5	20:16 27:9
41:15	probably 17:19	punishment 40:7	recovery 11:11	30:12 31:1 35:3
Petitioner's 35:1	21:22 30:2	punishments	refer 12:13 22:14	35:17 40:19
35:16 37:3,19	34:21	40:1	27:1 43:25	required 5:15
phrase 39:4,13	problem 22:24	purposes 24:9	reference 16:19	18:22
picked 24:17	30:21	pursued 22:19	21:4 23:21 24:5	requirement 5:6
picks 24:22	problems 31:11	put 12:1,17 36:14	29:9 37:4 38:8	20:16 34:11
33:13	proceed 40:5	38:4	39:15	45:9
plain 28:1,21	proceeding	p.m 45:19	referring 13:5	requirements
plaintiff 27:13	11:12,17		40:7	5:13 33:11
plea 31:24 32:8	procuring 40:17	Q	refers 21:2,17	requires 13:19
32:13	proof 5:9 11:24	question 9:18	23:15 24:7	13:22 26:6
plead 32:3	16:4	25:16,24 32:2	25:11 37:20	reserve 16:11
pleas 32:15	property 23:20	32:20 40:12	38:8 39:7 40:17	respect 24:24
please 3:9 12:23	prosecute 35:11	43:21 45:3	reflected 11:14	Respondent 1:20
16:18	35:15	questions 41:9	reflecting 20:8	2:7 16:16
pled 3:12	prosecuted	44:23,25	refunds 37:24	response 45:2
point 10:20 14:1	34:23 37:16	quite 15:10 44:13	refuse 8:20	rest 23:12
14:14 15:3,9	prosecutes 30:15	R	refused 18:11	restaurant 41:8
29:7 30:6 31:19	30:16	R 3:1	regard 38:22	result 32:12 43:1
pointed 24:15	prostitution 24:6	rape 23:16	regard 38:22	return 3:13 4:24
29:17	24:10	rarely 33:24	relevant 39:11	8:7 10:24 17:6
pointless 13:13	prove 4:7 5:19	reach 17:9 18:11	reliance 7:25 8:2	17:18 18:23,25
13:15 14:13	5:20 8:5,5,8,12	read 6:8 9:20,21	27:10,16,24,25	20:4 21:3,5
policy 33:15,22	8:24,25 11:21	26:2,12 27:3	relied 8:9 27:14	28:5 35:12
position 13:10	15:23 18:14	38:19 43:3,5	rely 7:21 12:18	40:23,23
15:8 31:25	27:10,16,22,23	44:19,20	27:21 28:12	returns 7:22
42:18	27:25 31:24	reading 6:5	relying 7:23 29:5	15:16 17:17
possibilities 23:2	proves 20:22	31:13 35:1,16	remainder 16:11	44:16
postcard 9:11	provided 5:17	37:4	remaining 41:13	revenue 6:13
postcards 13:20	providing 41:7	really 6:16 9:18	remind 42:23	11:15 13:4,6,12
potentially 34:24	proving 4:8	20:22 22:9	remove 16:21	14:8,9 15:17,19
power 22:9	11:20	31:16,17	removing 17:9	15:24 16:6,9
practical 31:19	provision 13:6	reason 11:25	reply 12:12,14	29:12 35:19
39:21	14:13 20:23	18:10 21:23	report 14:24	37:5,20 38:3,12
practice 20:13	21:18,21 22:12	24:16 25:4	15:21 43:22,23	38:21 39:5,11
31:5	25:1 29:17 31:7	30:13,24 42:20	44:1,7	40:13,14 42:10
precise 12:5	35:5 36:7 38:8	reasons 10:22	reporting 16:1	42:11,22 44:5
predecessor	provisions 19:6	36:2,24	representing	right 13:25 18:3
22:6	22:13 23:14	rebuttal 2:8	44:14	21:13 26:5
present 26:13	24:2 34:24 35:4	16:12 41:14	reprint 22:13	28:13 34:17
41:18	35:15 37:3 38:9		reprinted 20:24	ROBERTS 3:3
			32:10	

12:3,7 16:13 20:18 21:10 41:11 45:17 rule 23:7,22 36:20 37:1 43:12,14,17 rules 30:22 42:6 42:7 ruling 29:8 run 29:4 running 12:9	see 7:22,25 9:22 23:13 36:12 38:7 seek 11:11 21:2 seeking 24:10 31:21 seeks 11:16 seen 21:25 sense 27:11 sentence 31:8 sentencing 39:22 separate 19:21 27:24 separated 16:6 serious 24:25 26:21 serve 32:4 service 25:17 33:16 settle 44:11 severe 24:21 show 6:14 16:25 shown 6:22 18:23 significant 23:14 signing 28:4 similar 22:19 Similarly 11:8 41:22 simple 9:18 simple-minded 10:8 simply 4:12 5:14 6:17,21 7:14 11:6 14:24 15:15,20 42:13 42:19 single 14:4 38:8 solely 44:19 Solicitor 1:18 somebody 6:19 7:13 9:8 10:2 10:24 17:6 18:1 34:20,21 35:11 40:3 somebody's	17:12 sorry 7:18 12:3 sort 28:21 Sotomayor 7:18 8:8,15 9:1 15:11 19:5,9,11 19:20,24 speaking 21:7 special 9:25 10:3 10:7 specific 16:19 25:8 27:3 42:12 specifically 3:15 6:11 22:15 speculation 42:14 Spies 6:11 stand-in 40:8 start 32:19 State 31:7,10,15 statement 3:12 4:18 5:15,25 7:1,6,7,14,21 7:23 8:18 9:24 10:15 11:7 15:13 20:7,10 26:4 41:20,24 statements 8:1 21:12 33:8 35:14 37:9 States 1:1,13 3:11 32:3,5 35:6 stating 35:22 statute 3:16,21 3:21,23 4:4 5:5 6:5 7:15 8:4 10:12 11:12 12:9,13 15:24 19:21 21:21 22:3,4,12 23:24 25:15 26:13,16 26:21 32:22 33:7,13,14 34:6 36:1 39:7 40:17	40:19 43:3,4,7 43:10 45:5 statutes 4:2,2 12:17,24 16:6,7 24:8 25:2 27:2 32:25 38:5 statutory 22:6 23:7,22 30:22 39:18 45:9 steps 17:7 stick 8:19 submit 5:9 7:3 submitted 45:18 45:20 subparagraph 16:20,22 23:15 23:17 24:3 suffers 42:25 suggest 13:7 14:6 18:5,6 45:15 suggesting 14:20 suit 18:3 superfluidity 29:16 35:25 36:21,23 superfluities 42:7,8 superfluity 23:24 superfluous 23:8 23:10 25:7 29:17 42:17 super-careful 23:5 supply 20:5 supports 29:5 suppose 9:8 17:25 25:23,23 Supreme 1:1,13 sure 8:15 10:6 22:24 24:14 29:14 32:14 surprised 9:6 suspenders 21:22	swell 31:16 Swiss 17:13 synonymous 18:9 <hr/> T <hr/> T 2:1,1 take 8:18 13:10 17:7,13 24:19 takes 9:10 talk 39:11 talking 10:11 12:17 20:3,24 23:11 28:23 30:11 43:1,2 talks 25:9 28:25 tax 3:13,23,23 5:5 6:13,16 7:15,22,24 8:7 8:7,14,16,17 8:17,21 9:4 10:24 11:8,9,22 13:16,22,24,24 14:11,23 15:23 16:3,6,19,21 16:24 17:6,19 18:6,8,8,19,20 18:21,25 19:6,7 19:9,10,12,15 19:17,20,22,23 20:4,14 21:4,5 21:8,14,18 22:6 22:15,18,24,25 24:22,22,25,25 25:10,10,20,21 29:8 30:15,16 31:6,16 34:8,23 35:1,2,11,11 35:12,15,16,22 36:9,11,13,16 36:18 37:13,22 38:5,9 39:3,6 39:10,16,20 40:3,9,23,23 42:16,19,21
---	---	---	--	--

43:1,21 taxation 17:24 35:7 taxes 8:1 9:4,13 11:12,17 15:15 20:8 taxpayer 5:16 11:1 44:18 45:14 technical 40:10 43:20 tell 3:24 7:10 22:10 38:23 tells 44:21 term 25:25 28:1 28:14 31:9 terms 3:21 28:20 terrible 26:22 text 12:15,19 textual 31:2 textually 24:16 Thank 16:13 41:11 45:17 thing 4:3 17:21 19:23 22:22 23:18 37:20 39:22 things 18:5 33:23 42:10,14 think 6:6 9:25 15:11 16:23 18:5 19:6 20:9 20:22 21:4,9,11 21:16,20 22:16 22:22 23:10,11 23:25 24:12,15 24:16 25:4,8,9 26:17 27:11,25 28:14,17,19,20 29:3,9,10,23 30:9 32:17 33:19 34:22 35:21,25 36:13 36:24 37:1,22 39:4,14 40:8	41:2 thinking 23:1 35:4 third 13:8 45:1 third-parties 16:8 THOMAS 1:16 2:3,9 3:6 41:14 thought 10:2 35:8 thousand 43:22 threshold 44:2 thrown 32:2,5 tied 34:18 39:23 time 10:17 16:12 23:5 32:5 times 3:17 Title 38:19 39:21 39:25 today 41:18 told 31:21,25 tort 26:10 27:11 27:12 28:10,11 torts 26:5 total 43:23 totally 10:5 tracks 21:20 traditional 26:10 27:7 40:18 traditionally 26:6 transporting 24:9 treaty 9:10 trial 32:3 tried 15:12 trigger 19:1 20:15 triggered 18:22 22:5 25:9 trouble 35:22 true 6:6 23:18 28:8 35:10 truth 3:24 38:24 truthful 8:1 truthfully 19:16	try 9:20 31:22 trying 5:3 15:3 29:8 36:25 turn 31:18 35:19 turpitude 18:4 two 29:18 33:2 33:17 34:7 38:18 types 39:14 <hr/> U underlying 33:25 40:19,23 undermine 11:5 understand 29:15 37:19 40:11 42:16 43:20 understatement 18:10,14,15,22 understates 18:25 unintentionally 6:19 United 1:1,13 3:11 32:2,5 35:6 unpaid 11:17 unreported 8:6 unsure 36:2 unsurprising 22:19 upheld 15:8 urge 41:10 use 28:20 37:15 37:16 38:15 39:22 useless 14:13 uses 21:7 usually 17:8 utterly 23:6,6 UX 1:3 U.S.C 3:14 4:3 12:4 20:3 35:5 35:12,13	<hr/> V v 1:5 3:4 various 23:18 versus 42:12 victim 13:2 25:3 27:21 33:5 36:16 38:12,14 38:17,20,23 39:2 42:11 victims 13:3 36:16 38:12,14 38:17,20 42:11 view 33:10 viewed 10:21 violate 9:17 10:2 26:8 violation 6:7 15:18 31:10 40:20 41:4 violence 23:17 virtually 24:12 <hr/> W Walters 11:3 want 5:10 7:4,5 28:12 40:3 45:11 wanted 8:12 24:14 36:13,17 wants 40:2 Washington 1:9 1:16,19 way 6:7,8 14:16 17:12 28:18,24 29:5 36:10 37:2 weed 39:16 went 9:13 35:21 we're 10:11 20:24 42:24 Whalen 1:16 2:3 2:9 3:5,6,8 4:11 4:15,17,20 5:2 5:13,23 6:1,10 7:2,9,12 8:2,11 8:23 9:6,14	10:10 12:5,8,12 12:20 13:23 14:2,5,19 15:3 15:18,22 41:12 41:14,16 43:8 43:11 44:2,8 wife 40:13 willful 5:21,22,24 13:17 19:14 20:4 21:17 willfully 5:25 6:15,15,16,20 6:20,23,25 7:2 9:23 14:22 28:9 willfulness 7:8 wire 37:8 withdraw 8:19 wonder 30:20 33:22 word 21:8 words 13:1 27:3 33:12 42:9 worried 30:21,24 worth 37:24 worthless 13:13 wouldn't 9:12 13:15 21:13 24:23 37:12,13 38:6 write 10:6 23:8 36:7 writes 9:10 10:24 writing 10:4 13:19 36:10 written 3:22 6:11 wrong 6:4 10:9 10:10 22:10 38:4 42:15 <hr/> X x 1:2,8 <hr/> Y year 45:10 years 34:7
---	---	---	--	---

Yermian 28:24 41:17	371 35:5,8 37:10 39:25	26:2,8 31:3,13 31:24 32:13,21 39:20 41:5 44:11,19		
\$	4			
\$1 43:24	4 32:10 45:8	7206(1) 9:21		
\$10,000 13:3	41 2:10	7207 20:11		
17:12 20:15	43 9:20 23:12	76 9:21		
29:12 33:6	24:2 31:9	76-some 43:22		
34:11,22,25				
36:17 37:7,24	5	8		
37:25 38:13,17	5-year 39:18	8441 23:21		
39:2				
\$200,000 33:19	6			
33:20	6501 11:15 12:1			
\$245,000 43:25	12:4			
43:25 44:5	6501(c)(i) 20:19			
\$76,000 44:1,7	6501(c)(1) 12:6			
	20:25 21:15			
1	6531 22:11,18			
1 45:9				
10,000 13:4	7			
10-577 1:5 3:4	7 1:10			
1001 4:3	70 12:1			
11:07 1:14 3:2	72 8:14 42:19			
117 32:10	7201 5:5 9:16,17			
12:08 45:19	10:1 13:18,22			
1341 35:12 39:25	14:19 16:2			
1343 39:25	17:22 18:1			
16 2:7	19:23 21:19,20			
18 4:3 35:5,12,13	21:24 24:20			
39:25	25:23 29:10			
1985 3:11	30:10 31:2,6,23			
1991 40:24	37:5 38:8,19			
	39:5,9,15,18			
2	40:7			
2 9:21 21:17	7202 19:14			
2011 1:10	7203 17:20 19:18			
26 3:14 12:4 20:3	20:2,4			
38:19 39:21	7204 20:6			
286 35:14	7206 3:14,20 5:7			
287 35:13	5:14 8:3 10:14			
3	10:21 11:16,19			
3 2:4	11:25 14:18			
3-year 39:19	16:2 18:11,13			
34 17:3	21:7,12 24:16			
	24:18 25:24,24			